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CHEVRON STATIONS INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Catherine Tremblay, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

Chevron Stations, Inc., a Delaware
Corporation,

Defendant.

CASE NO. CV 07-6009 EDL

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF REQUESTED
BRIEFING SCHEDULE RE:
PLAINTIFF'S MOTION FOR
CERTIFICATION OF COLLECTIVE
ACTION**

Complaint Filed: November 28, 2007

The Complaint alleges that, "[i]n this collective action, Plaintiff seeks to represent all individuals who were employed by Defendant." *See* Complaint, ¶ 37. The parties have stipulated, and the Court has ordered, that Plaintiff must file her motion to conditionally certify the collective action on or before April 1, 2008. At the recent Initial Case Management Conference, Defendant asked that its opposition be due 90 days after the date on which the

1 motion is filed and the Court ordered briefing on the issue of whether or not Defendant should be
2 given the requested 90-day period for its opposition.

3 As explained herein, the Court should order that Defendant's opposition to Plaintiff's
4 motion to conditionally certify the collective action is due 90 days after the date on which
5 Plaintiff's motion is filed. Otherwise, the Court runs the risk of conditionally certifying a
6 collective action in error based upon an inadequate evidentiary record.¹

7 I. INTRODUCTION

8 Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), 29
9 U.S.C. § 216(b), permits an employee to maintain an action for violations of FLSA section 206
10 (minimum wage) and/or section 207 (overtime), 29 U.S.C. § 206 &/or § 207, "by or on behalf of
11 himself . . . and other employees **similarly situated**." (Emphasis added). Plaintiff has alleged
12 that she seeks to bring a § 216(b) collective action on behalf of herself and "all individuals who
13 were employed by Defendant." *See* Complaint, ¶ 37. The Court has ordered Plaintiff to file her
14 motion to certify the collective action by April 1, 2008.

15 Plaintiff's motion presumably will attempt to convince the Court that "all individuals who
16 were employed by Defendant" are "similarly situated." If the Court makes such a finding, it can
17 conditionally certify the collective action and order the mailing of a notice to all such employees
18 advising them of the case and their opportunity to consent to be a party by opting in. *See* FLSA §
19 216(b) ("No employee shall be a party plaintiff to such action unless he gives his consent in
20 writing"). *See also Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989).

21 Plaintiff has advised that Court that this decision can be made on the basis of a "modest
22 factual showing" by Plaintiff. *See* Memorandum Regarding Briefing Schedule for Motion for
23 Certification of Collective Action ("Plaintiff's Memorandum"), p. 8. This is wishful thinking on
24 her part. While the burden Plaintiff bears is a lenient one, *Pfohl v. Farmers Ins. Group*, 2004 WL
25 554834 *2 (C.D. Cal. 2004), Plaintiff still bears the burden of demonstrating a "reasonable basis"

26 ¹ The Court asked the parties to brief a single issue: whether Defendant is entitled to an
27 extended briefing schedule to respond to Plaintiff's motion for conditional certification.
28 Accordingly, in this Memorandum, Defendant does not respond to pages 1 through 6:5 of
Plaintiff's Memorandum, which is about something else. Defendant does not waive its rights to
respond to these arguments and expressly reserves its right to do so at the appropriate time.

1 for her claim of class wide discrimination, "that is, detailed allegations supported by affidavits
 2 which successfully engage Defendant's affidavits to the contrary." *Grayson v. K Mart Corp.*, 79
 3 F.3d 1086, 1096 (11th Cir. 1996). As one court has interpreted this standard "The basis for a
 4 class-wide discrimination claim must be more than mere allegations; it must be based on factual
 5 evidence as well." *Bernard v. Household International, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va.
 6 2002).

7 To counter Plaintiff's motion for conditional certification, Chevron must be allowed the
 8 opportunity to investigate and to gather and present evidence negating that those in Plaintiff's
 9 would-be collective action are similarly situated. Defendant's proposed briefing schedule
 10 accomplishes this goal and limits the risk that the class may be conditionally certified in error.
 11 Moreover, a short period of discovery additionally guards against false expectations by potential
 12 claimants, unnecessary expense for the parties, and unwarranted burden on the Court, when there
 13 ultimately may be no evidentiary basis for Plaintiff's claims to survive. Accordingly, Defendant
 14 respectfully requests a period of ninety (90) days after Plaintiff files her motion for conditional
 15 certification for it to file its opposition.

16 **II. ARGUMENT**

17 The FLSA allows for the maintenance of a collective action "by any one or more
 18 employees for and on behalf of himself or themselves and other employees similarly situated."
 19 29 U.S.C. § 216(b). Under the FLSA's "opt in" scheme, however, an employee who wishes to
 20 join a FLSA collective action must "give his consent in writing to become such a party and such
 21 consent [must be] filed in the court in which such action is brought." *Id.*

22 The United States Supreme Court has held that "district courts have discretion, in
 23 appropriate cases, to . . . facilitat[e] notice to potential plaintiffs" in FLSA collective actions.
 24 *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989) (emphasis added). *See also Haynes*
 25 *v. Singer Co.*, 696 F.2d 884, 886 (11th Cir. 1983) ("the power to authorize notice must be
 26 exercised with discretion and only in appropriate cases.") But, in exercising this discretion, a
 27 court must remain mindful that "courts, as well as practicing attorneys, have a responsibility to
 28 avoid 'stirring up' of litigation through unwanted solicitation." *Holt v. Rite Aid Corp.*, 333 F.

1 Supp.2d 1265, 1275 (M.D. Ala. 2004). Thus, courts refuse to authorize class notice premised
 2 entirely on unsupported, conclusory allegations. *See, e.g., Severtson v. Phillips Beverage Co.*,
 3 137 F.R.D. 264, 266 (D. Minn. 1991) (allegations in a complaint, "standing alone, are an
 4 insufficient basis for determining whether sending court-authorized notice is appropriate").

5 Before a court may authorize issuance of notice of an FLSA collective action, the named
 6 plaintiff(s) must establish that they and all members of the proposed class are "similarly situated."
 7 *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Dybach v. Florida Dept. of*
 8 *Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991) (noting that "the district court should
 9 satisfy itself that there are other employees of the department-employer who desire to 'opt-in' and
 10 who are 'similarly situated'"); *Castle v. Wells Fargo Fin., Inc.*, 2008 WL 495705 at * 2 (N.D. Cal.
 11 Feb. 20, 2008) (Plaintiff bears the burden of demonstrating a "reasonable basis" for claims of
 12 class-wide discrimination); *Harper v. Lovett's Buffett*, 185 F.R.D. 358, 362 (M.D. Ala. 1999)
 13 ("Plaintiffs have the burden of demonstrating a reasonable basis for crediting their assertions that
 14 aggrieved individuals exist in the broad class that they propose."); *D'Anna v. M/A-Com, Inc.*, 903
 15 F. Supp. 889, 894 (D. Md. 1995) ("plaintiff has the burden of demonstrating that notice is
 16 appropriate").

17 While, as Plaintiff notes in her submission, the issue of notice and conditional certification
 18 is resolved in the first stage of a two-stage process, even at the notice stage Plaintiff must make "a
 19 preliminary factual showing that a similarly situated group of potential plaintiffs exists." *D'Anna*,
 20 903 F. Supp. at 894; *see Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va.
 21 2002) ("some factual evidence is necessary"); *Severtson*, 137 F.R.D. at 267 (requiring "some
 22 factual basis for plaintiffs' claims of class-wide discrimination before judicial approval of the
 23 sending of notice is granted.") While the Court will apply a rigorous "similarly situated" test later
 24 in the litigation, even the more minimal standard applied at the notice stage requires an
 25 appropriate factual showing, to ensure that the notice does not unreasonably generate expectations
 26 for claimants, expense for the parties, and burden for the court when there is no evidentiary basis
 27 for believing that Plaintiff's class claims can survive. *See, e.g., Stubbs v. McDonald's Corp.*, 227
 28 F.R.D. 661, 666 (D. Kan. 2004) (the "initial ad hoc certification standard . . . require[s] plaintiff to

1 provide more than his own speculative allegations"); *H&R Block, Ltd. v. Housden*, 186 F.R.D.
 2 399, 400 (E.D. Tex. 1999) (plaintiff at notice stage must "come forward with competent
 3 evidence").

4 Accordingly, at the notice stage, courts regularly reject the argument that named plaintiffs
 5 may rely solely on unsupported allegations to obtain judicially-approved notice to a proposed
 6 class. *See, e.g., Dudley v. Texas Waste Sys., Inc.*, 2005 WL 1140605 at *2 (W.D. Tex. May 16,
 7 2005) (denying motion "[g]iven that the evidence presented by Plaintiff fails to sufficiently
 8 demonstrate the existence of a 'similarly situated' class of employees and Plaintiff's complaint and
 9 affidavits in support thereof contain unsupported assertions"); *Hall v. Burk*, No. 301CV2487H,
 10 2002 WL 413901, at *3 (N.D. Tex. March 11, 2002) ("Unsupported allegations of widespread
 11 violations are not sufficient to meet Plaintiff's burden."); *Santielices v. Cable Wiring, Inc.*, No.
 12 98-7849CIV, 1999 WL 1007807, 6 WH Cases 2d 1852 (S.D. Fla. Sept. 28, 1999) (requiring
 13 evidentiary showing prior to notice and refusing to issue notice in absence of evidence of
 14 similarly situated employees); *Watts v. Marion County*, No. 94-1428FR, 1995 WL 264189, 2 WH
 15 Cases2d 1343 (D. Or. May 1, 1995) (refusing to issue notice where plaintiff failed to offer
 16 evidence that proposed recipients were similarly situated to plaintiff); *D'Anna*, 903 F. Supp. at
 17 894 (refusing to issue notice based on unsupported allegations in the plaintiff's complaint). As
 18 one court explained in refusing to authorize notice premised solely on unsupported allegations:

19 These allegations, standing alone, are an insufficient basis for
 20 determining whether sending court-authorized notice is appropriate.
 21 In seeking court-authorized notice, plaintiffs are in effect asking
 22 this court to assist in their efforts to locate potential plaintiffs and
 thereby expand the scope of this litigation. As a matter of sound
 case management, a court should, before offering such assistance,
 make a preliminary inquiry as to whether a manageable class exists.

23 *Severtson*, 137 F.R.D at 266. Consequently, this Court must be satisfied that Plaintiff and the
 24 class, as it is defined by Plaintiff ("all individuals who were employed by Defendant," Complaint,
 25 ¶ 37), are similarly situated. More specifically, Plaintiff must demonstrate that she is similarly
 26 situated to all other Chevron Stations Inc. employees, be they exempt, non-exempt, managers, or
 27 cashiers. To demonstrate such similarity, Plaintiff must, at the very least, submit declarations
 28 from numerous current and/or former employees.

1 Because Plaintiff must present evidence sufficient to satisfy this requisite showing,
2 *D'Anna*, 903 F. Supp. at 894, Chevron should be afforded a meaningful opportunity to gather and
3 present evidence demonstrating that the employees in fact are not similarly situated. Specifically,
4 Chevron needs time to depose any declarants advanced in support of Plaintiff's motion, collect
5 and present documents in support of its opposition, and to prepare its own declarations and other
6 supporting evidence.

7 Judge Illston recently denied a motion for conditional certification of a collective action in
8 a matter where the class included approximately 14,000 individuals. *Castle*, 2008 WL 495705 at
9 * 1. In *Castle*, Plaintiff submitted 24 declarations, deposition excerpts, and other evidence at the
10 conditional certification stage. *Id.* Defendant countered with 99 declarations, and copies of
11 plaintiffs' declarants' time cards and pay records. *Id.* Based on this evidence, Judge Illston held
12 that the plaintiffs did not identify any company-wide policy or practice to deny overtime and thus
13 "failed to show that the various...employees are similarly situated for purposes of class
14 certification." *Id.* at * 5. Without the parties' opportunity to conduct some discovery, the *Castle*
15 class could have been improperly certified at the notice stage and thousands of current and former
16 employees would have improperly received notice. Additionally, both the parties and the Court
17 would have been forced to unnecessarily spend time and resources on a case that ultimately
18 would be decertified. To prevent such inefficiencies and waste, especially in a class of this
19 magnitude, this Court should permit a brief period for discovery subsequent to Plaintiff's
20 submission of a motion for conditional certification.

21 **III. CONCLUSION.**

22 For the foregoing reasons, this Court should adopt Chevron's proposed briefing schedule
23 of ninety (90) days for Defendant to respond to Plaintiff Catherine Tremblay's motion for
24 certification of a collective action.

1 Dated: March 6, 2008

JONES DAY

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3 By: /S/ Catherine S. Nasser
4 Catherine S. Nasser

5 Attorneys for Defendant
6 CHEVRON STATIONS INC.

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